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Trusts: Personal Liability of Trustee for Torts

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TRUSTS—PERSONAL LIABILITY OF TRUSTEE FOR TORTS

In the normal course of their duties, trustees, executors and administrators are confronted with a vast amount of detail and effort. They find themselves confronted with courts which from the earliest times have jealously guarded and protected the cestui que trust and the trust estate itself. Such individuals are in most instances required to furnish a bond to guarantee their faithful performance of their duties. As a consequence the tendency is for the trustee to focus his attention on the preservation of the trust estate to the best of his ability while giving no thought whatsoever to the fact that he may have innocently exposed himself to liabiilty personally — with no right to indemnity or at best an insufficient right under the circumstances.

Much has been said in this regard in the matter of improper investment of the trust funds themselves. However the matter is now covered in Wisconsin by Statute[1] and a wealth of judicial decision,[2] and will not be treated here. The situation here for discussion is that in which the trustee, or one of his agents or servants commits a tort in connection with the trust estate.

The general rule in regard to the liability in such situations is somewhat startling at first glance; that is, that the trustee himself is held to be *personally* liable for all damages arising therefrom.[3] The general rule has been summarized as follows:

> A trustee of a private trust is personally liable for torts committed by himself, or by his servants or agents when they are acting in the course of their work for him. In very few cases is a suit against the trustee as such and recovery from the trust property allowed.
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> A trustee of a charitable trust is personally liable for torts committed by himself, but not for those committed by agents or servants.[4]

The great weight of English and American authority imposes responsibility for such torts upon the trustee in his individual capacity and not as a fiduciary. Any judgment recovered is collected out of the private property of the trustee and not out of the trust assets.[5] The fundamental reason behind this liability is that the trustee is the only legal person who has anything to do with the trust estate and yet he is not a legal person as such, nor is the trust property. The trustee in short is regarded as the legal and equitable owner

[1] Wisc. Stat. (1945) Chap. 320 Trust Fund Investment.
[2] Will of Wehner 238 Wis. 557, 300 N.W. 241.
[3] For numerous cases holding a trustee personally liable for torts committed in the administration of the trust, see 2 Scott, Trusts, Par. 264; 3 Bogert, Trusts and Trustees, Par. 731; 125 A.L.R. 458 (1939).
[4] Bogert on Trusts (1942) Par. 117 at page 385.
[5] Bogert on Trusts Vol. 3, Par. 731.

of the property, the beneficiary having merely the right to have the trust duties performed.

A recent case sharply exposed the danger that the trustee is thus confronted with when part of the trust estate consists of real property. in *Kirchner v. Muller,*[6] an action for personal injuries, one of the defendants was the trustee in control of the property in question. The Plaintiff was injured while walking in front of the premises on the sidewalk. The property was described as "owned and controlled" by the defendant, trustee Muller. Thirty eight years before, the then owner had left a plank covering a drain in the sidewalk protruding over the curb. On the day in question a truck in parking struck the plank which flew up and injured the plaintiff. The truck driver was absolved of negligence and the defendant tustee was held pesonally liable to the plaintiff for her injuries. Therein the court said:

> "As to the plaintiff, whatever was the title or right of the defendant, they had an obligation to her, because as natural persons they were in control of the premises and managed them, and were liable for any negligence on their part . . . The . . . The general rule in most jurisdictions is that where a trustee is sued as a trustee, a judgment may be entered against the defendant individually and the words "as trustee" may be treated as surplusage."

An action against a trustee who has personally or through an agent or servant committed a tort, such as libel, slander, assault, negligence or conversion, should therefore, name the trustee as the defendant, and omit all reference to his trusteeship, and if judgment is recovered against the trustee it may be satisfied out of his own property in full, without regard to the amount of the trust property or the possibility of recovery by the trustee from the trust. Of this last point I shall say more later.

There is a dearth of judicial decision on the subject in Wisconsin. The subject is directly covered in the Restatement of Trusts[7] and under the Wisconsin annotations of that section the author therein could locate no Wisconsin decision in point. However there has been an implication in one Wisconsin case that the general rule is accepted and would be applied should the case present itself. The Wisconsin court has stated:

> "Though the trustee may be personally liable for waste or fraud, (it would appear that other torts also might here be included by implication) the estate itself is subject to all liabilities arising out of the property held in trust".[8]

[6] Kirchner v. Muller, 280 N.Y. 23, 19 N.E. (2d) 665 (1939).
[7] Restatement of Trusts Sec. 264.
[8] Banking Comm. in behalf of Citizen's State Bank v. Marquardt, 218 Wis. 210, 260 N.W. 464 (1935).

A Federal District court is in accord with this opinion.[9] The last reference in the quotation would appear to refer also to the right of indemnity of the trustee in cases where he was guilty of no fault; and not a recovery against the estate directly.

In an Illinois case[10] the intervenor was the administrator of the estate of deceased who had been employed by the Crescent Paper Box Manufacturing Company. The latter was lessee of a building of which the defendant was a legal holder as trustee of an estate. A water tower on the building collapsed, fell through the building, and killed intervenor's intestate. In spite of the fact defendant trustee did not have possession of the building and that the lessee was under a duty to repair, defendant trustee was held personally liable and judgment rendered against him for $7000 with right to indemnity from the trust estate which consisted in part of the building in question. The court stated therein:

> "In a court of law a trustee having the legal title to real estate, together with the right of possession is regarded as the owner of the property, having all the rights and subject to all the liabilities of ownership. The duties of the trustee as owner makes him personally liable for torts committed by him or by the agents or servants in his employ."

An insight into the reasoning behind the general rule was given in a New York case which is directly in point on the subject under discussion.[11] The reason there stated was:

> "That the law will not allow trust property to be impaired or dissipated through the negligence or improvidence of trustees, nor will it permit them to create any new or additional liabilities against the same. The beneficial interest thereof belongs to the cestuique, and it must be held intact for them."

And the holding of that case was that trustees having the title to real estate were not liable in their representative capacity to persons rightfully on the premises, for injuries received on account of the negligence of the trustees in permitting the premises to be out of repairs.

Another case shows that trustees operating a business as part of the trust res has the same liability confronting him.[12] Here an executrix, who was the sole beneficiary under the will and who was operating a logging road as executrix was held individually liable for damages resulting from the negligent operation of the railroad in starting a forest fire.

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[9] United States v. Earling, 39 Fed. Supp. 864 (E.D.Wis. 1911).
[10] Schmidt v. Kellner et al 138 N.E. 604, 307 Ill. 331 (1923).
[11] Keating v. Stevenson, 21 App. Div. 604, 47 N.Y. Supp. 847 (1897).
[12] Fisher v. McNeely, 110 Wash. 283, 188 Pac. 478 (1920).

The next question which arises is the extent of the rights of the trustee to indemnity from the trust estate. When such indemnity will be granted and when denied.

The general rule, supported by many cases,[13] is that the estate cannot be held liable for a tort committed by the trustee, executor or administrator. This is almost universally true of a passive trust. If an active trust, the trustee may be able to obtain reimbursement from the trust estate under certain conditions. That is if the executor, administrator or trustee is without personal fault or negligence and has acted for the benefit of the estate in the line of his duties, it seems well settled by the authorities that he may have a right to reimbursement from the estate for claims of third parties for damages to which he has been personally subjected.[14]

Thus, in a well known English case[15] the trustee of a coal mine had a duty to support the surface of the ground which was owned by another person and which was located above the mine. Although the trustee took reasonable precautions to hold the surface up, he did in fact let it down. This was a violation of an absolute duty imposed on him by the common law, but it was a tort without any personal fault on the part of the trustee. The court held that the trustee was entitled to indemnity against this tort liability.

The Restatement of Trusts[16] states the scope of the rule to be as follows:

> "While the trustee is personally liable to third persons for torts committed by him in the course of the administration of the trust, if the liability was incurred in the proper administration of the trust and the trustee was not personally at fault in incurring the liability, he is entitled to indemnity out of the trust estate."

That rule being fairly well established the next question is whether a trustee is personally liable for the amount of a judgment in excess of the amount that the trust estate is able to pay. A Nebraska case[17] stated the following apparently as dicta;

> "We are constrained to the view that, if the liability arises from the mere fact that the fee title to the trust property is in the trustee, the liability of the trustee to third persons is limited to the extent to which the trust estate is sufficient to indemnify him where he is without fault and where he is not responsible for the insufficiency of the estate to make indemnity."

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[13] 44 A.L.R. 640 Van Slooten v. Dodge, 145 N.Y. 327, 39 N.E. 950 (1895.).
[14] Ibid., footnote No. 11.
[15] In re Raybould (1900) 1 Chancery 199.
[16] Restatement of Trusts Sec. 247 comment a.
[17] Smith v. Rizzuto, 133 Neb. 655 276 N. W. 406 (1937).

The same case holds that where the instrument creating the trust makes the trust estate liable, that the trust estate may then be sued directly. This seems to be contrary to the great weight of authority. The major case[18] allowing such direct suit maintained that the action could be brought directly against the estate whenever the trustee had a right to reimbursement. This rule while apparently reasonable and aiding in avoiding circuity of action, at the same time might expose trust estates to a greater danger from mismanagement, in that the trustee would then be personally freed from the major portion of his personal liability. His employment of agents and servants would not be as closely guarded since then all danger from the doctrine of respondeat superior would be removed. It would seem that the great weight of authority is that insertion of a clause in the trust agreement for indemnity will hold little if any weight in that a tort is not contemplated and is considered for most purposes to be an act outside the scope of the duties of the trustee and therefor one not to be contemplated in the inception of the relationship of trustee and trustor. The confusion on this point may well arise from the fact that it is possible for the trustee to exclude personal liability by inserting a clause to that effect in a contract. However contract and torts are poles apart.

The trustee is exposed to a further liability as a property owner. His liabilities arising from holding title to the trust property are the same as if he owned the property beneficially. Examples of such liability exist in the case of taxes and calls or assessments on the stock of a corporation. However he has a right of indemnity against personal liability incurred as title holder. This general proposition has been adopted by the Wisconsin courts.[19] Now by Wisconsin statute[20] real property is assessed to the owner of legal title and it has been held that a trustee should be thus included. A limitation on the liability of trustees holding stock has been made by statute[21] in regard to trustees holding bank stock, but has been repealed in the 1945 legislature and would therefore leave the implication that trustees now are liable on bank stock to the same extent as an ordinary shareholder.

It is apparent therefore that there are at least two situations into which a trustee may be placed that may expose him personally to severe liability with an inadequate or non-existent right to indemnity. That is where he is controlling considerable real property or a business organization of such type that it is reasonable to suppose that

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[18] Ewing v. Foley, Texas, 280 S.W. 499 (1926).
[19] Ibid., Footnote No. 8.
[20] Wisc. Stat., (1945) 70.17.
[21] Wisc. Stat., (1939) 221.42(1).

a tort may be committed in its administration, either by himself or an agent. His right to indemnity therein would become a question of fact as to whether the tort was committed in the normal administration of the trust and that he himself was guilty of no fault or negligence either himself or in selecting his agent. The second situation causing him exposure to liability without redress is where the property involved is not of sufficient value to cover any possible injury that might thereby be caused in its administration.

It is submitted that in view of the fact that there is no precedent in Wisconsin, that it is reasonable to suppose that this personal liability would attach should the situation arise. That the danger to trustees, executors, administrators, real estate agents managing property and all like individuals is very real, and that the liability should be included in liability policies as the only apparent remedy and safe guard.

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